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No. 10-1125

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IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EQUITY LIFESTYLE PROPERTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Equity LifeStyle Properties, Inc. ("ELS") is a real estate investment trust, or REIT, and is publicly traded on the New York Stock Exchange. ELS owns and operates approximately 300 land lease manufactured home communities (*i.e.*, mobilehome parks) in approximately 30 states, including California.[1]

ELS has a strong interest in this appeal as a California manufactured home park owner and as a litigant. Formerly known as Manufactured Home Communities, Inc. ("MHC"), ELS brought a federal court challenge to a mobilehome rent control law enacted by the City of San Rafael, California. Following an extensive trial, the district court found that the City's application of that law to MHC's mobilehome park constituted an unconstitutional private taking and a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *MHC Financing Limited v. City of San Rafael*, No. C-00-03785, 2008 WL 440282, at *17, *25 (N.D. Cal. Jan. 29, 2008). The district court issued a judgment that invalidated that law and phases it out over time. *MHC Financing Limited v. City of San Rafael*, No. C-00-03785, slip op. at 24-25

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[1] No counsel for a party authored this brief in whole or part and no party or counsel for a party made a monetary contribution to the preparation or submission of this brief. No one other than *amicus curiae* made such a monetary contribution. Counsel of record for all parties received timely notice of amici's intention to file this brief, and all parties have consented to its filing.

(N.D. Cal. Apr. 17, 2009). The City of San Rafael has appealed and the case is currently pending before the U.S. Court of Appeals for the Ninth Circuit.

The district court's decision in the *San Rafael* case illustrates a proper application of *Penn Central* standards. Although ELS's constitutional claims differ in certain respects from the Petitioners' claims, ELS has an interest in the proper application by the Ninth Circuit of *Penn Central* standards.

ELS was an amicus in earlier stages of the present case. ELS contends that the Ninth Circuit's holding is contrary to this Court's precedents and the many federal and state appellate decisions that have followed this Court's precedents, and urges the Court to grant the Petition.

SUMMARY OF ARGUMENT

"[W]hile property may be regulated to a certain extent, if [the] regulation goes too far[,] it will be recognized as a taking." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)). As this Court confirmed in *Lingle*, to determine if a regulation goes too far, a court should balance three factually-intensive factors that were identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978): the regulation's economic impact, its interference with investment-backed expectations, and its character. In addition, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held that it is erroneous to find a lack of substantial interference with investment-backed expectations just because the property owner

acquired the property after the challenged regulation was in place.

The Ninth Circuit's decision in this case ignored all of these principles. First, it directly contravened *Palazzolo* by holding that, in the context of a facial *Penn Central* claim, a regulation that was enacted before a purchase of property can *never* interfere with the property owner's reasonable expectations. A more direct conflict with a decision of this Court is difficult to imagine.

Second, the Ninth Circuit decision also is fundamentally inconsistent with *Penn Central*'s rules that a court must weigh all three *Penn Central* factors. The majority opinion did violence to the very purpose of the *Penn Central* multi-factor balancing test by ruling that the investment-backed expectation factor alone is sufficient to foreclose a facial *Penn Central* claim and that it is not necessary even to consider or balance the other two established *Penn Central* factors.

ARGUMENT

This Court should grant certiorari and confirm that the Ninth Circuit has fundamentally misstated the governing constitutional principles for determining whether a regulatory taking has occurred.

I. The Majority Opinion Is Inconsistent With The Court's Ruling In *Palazzolo v. Rhode Island*

In clear and direct contravention of the Supreme Court's ruling in *Palazzolo*, the Ninth Circuit held as

a matter of law that the Goleta rent control regulation did not, on its face, unduly interfere with the Guggenheims' investment-backed expectations, because the Guggenheims bought their property after the regulation was in effect.

The Ninth Circuit ruling directly contravened *Palazzolo*, which establishes that a purchasing property owner with notice of a regulation may reasonably expect that regulation to change. That expectation is particularly reasonable where, as in this case, the regulation is otherwise constitutionally suspect. The Ninth Circuit found that a property purchaser could never reasonably expect that an existing regulation will change even though the Guggenheims had offered substantial evidence, in opposition to summary judgment, that they did have reasonable expectations that the Goleta rent control regulation would not survive. The Ninth Circuit majority did not quarrel with the sufficiency of the Guggenheims' proof; rather, it found that the facts regarding the Guggenheims' expectations were irrelevant based on a categorical rule that a pre-existing law exclusively and irrebuttably defines expectations. In entering summary judgment against the Guggenheims despite their evidentiary submissions, the majority adopted an untenable rule that contravenes *Palazzolo* and neglected to evaluate all the evidence of the Guggenheims' expectations.

A. *Palazzolo* Requires Reversal Of The Majority Decision Holding That A Property Purchaser May *Never* Reasonably Expect A Change In Existing Law.

As the dissent aptly recognized, the Ninth Circuit majority opinion "flouts the Supreme Court's holding in *Palazzolo* that a 'postenactment transfer of title [does not] absolve the [government] of its obligation to defend' the restrictions a regulation imposes on property-owners." Pet. App. 46a (citing *Palazzolo*, 533 U.S. at 627; alterations in original). The court's decision "could be a logical conclusion to reach – but only were one to ignore (1) the instructions of the Supreme Court, (2) decades of political, legal, and economic developments, and (3) the actions of the Guggenheims." Pet. App. 34a. Thus, the dissent correctly recognized that the "distinctions" of *Palazzolo* that the majority identified are "mere differences, no more significant than that the Palazzolo land was in Rhode Island and the Guggenheim land was in California." Pet. App. 36a-37a (footnote omitted).

In *Palazzolo*, this Court explicitly held that landowners are not barred from establishing interference with investment-backed expectations simply because a regulation was in effect when they took title to their land. 533 U.S. at 627. The Court explained:

> Were we to accept the State's rule [that appellants had no investment-backed expectations because the ordinance was enacted before they purchased the land], the

> postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

533 U.S. at 627 (emphasis supplied).

The majority opinion "assumes the eternal validity without reform, of the so-called rent control ordinance." Pet. App. 35a. Contrary to the majority opinion, courts must "analyze a claimant's investment-backed expectations as if the regulation at issue could be repealed at any time." Pet. App. 37a (citing *Palazzolo*, 533 U.S. at 637). It is objectively reasonable for a landowner to believe that, over time, conditions can change and he will be able to collect rents that reflect market conditions. As Justice Scalia noted in his concurring opinion in *Palazzolo*, "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." 533 U.S. at 637 (Scalia, J., concurring).

The majority opinion artificially limited *Palazzolo* to cases involving as-applied claims. Pet. App. 14a-15a. But *Palazzolo*'s rationale applies with equal force to facial *Penn Central* claims. This Court's recognition in *Palazzolo* that it is reasonable to expect a regulation may change is just as relevant to

facial claims as it is to as-applied claims. The majority opinion cited no legal authority to justify its view that, in connection with a facial claim, a court should assume that a pre-existing regulation is static and immutable. There is no logical or precedential basis for this artificial limitation on this Court's ruling in *Palazzolo*.

B. The Expectation That A Regulation May End Is Particularly Reasonable Where The Regulation Is Otherwise Constitutionally Suspect.

The expectation that a regulation may be eliminated is particularly reasonable where, as in this case, the regulation itself is otherwise constitutionally suspect. "The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives to property of so much of its value as to be unconstitutional." 533 U.S. at 637 (Scalia, J., concurring).

Regardless whether they mount a facial or as-applied challenge and regardless whether the property at issue was acquired through a traditional purchase or some other type of transaction, landowners like the Guggenheims can have a valid and reasonable expectation that an unfair and unduly burdensome law will not continue in effect indefinitely. As property owners, they should not be required to forfeit their reasonable expectations merely because government enacts or enforces an arbitrary regulation. *See Penn Central*, 438 U.S. at 136.

It was particularly reasonable for the Guggenheims to believe that the courts might end enforcement of Goleta's form of mobilehome rent control for several reasons. First, as the dissent pointed out, "[l]egal uncertainty over rent control has been particularly marked in California. . . . The Guggenheims and the prior owners of their mobilehome park may have reasonably thought the state would abolish rent control – or at least vacancy control – for mobile home parks." Pet. App. 40a. As the dissent further noted, some California legislators have taken steps to repeal and reform rent control laws in the past and support for repeal efforts is significant. *Id.*

Second, the original panel decision in *Guggenheim* is the *third* time that the Ninth Circuit has held that certain mobilehome rent control ordinances amounted to an unconstitutional taking. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 (9th Cir. 1986) and *Cashman v. City of Cotati*, 374 F.3d 887, 897 (9th Cir. 2004). Although in prior instances the Supreme Court later clarified the applicable legal standards, the underlying vices that gave rise to this Court's constitutional concerns have not changed.[2] In each case, the Ninth Circuit

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[2] In *Hall*, 833 F.2d at 1280, this Court found a rent control ordinance amounted to a physical taking. The Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519, 526-27 (1992), later clarified that the challenged ordinance could not be classified as a physical taking, but it also found that the same ordinance might constitute a regulatory taking. In *Cashman*, 374 F.3d at 897 (vacated on other grounds by 415 F.3d 1027 (9th Cir. 2005)), the court found that the City of Cotati rent control ordinance constituted an unconstitutional regulatory taking

concluded that a rent control regulatory scheme improperly infringed on a property owner's constitutional rights.

Third, it was particularly reasonable for the Guggenheims to expect an end to the Goleta rent control law because the regulation fully capitalized all rent control savings at the time the Ordinance became effective and required incoming residents to pay in full for the value of those "benefits." That is so because, as the summary judgment record established and the Ninth Circuit majority acknowledged, Pet. App. 31a, once the rent control ordinance became effective, mobilehome owners in the City of Goleta were able to increase the sale price of their homes in an amount equal to the present value of the amount by which the ordinance was expected to hold rents below market rent levels, thereby transferring over 80% of the value of the park owner's land to the homeowners who happened to be in place at the time the ordinance became effective. As a consequence, the law does not make housing more affordable to residents who come into the mobilehome park after the ordinance became effective, who had to pay a premium on the price of their homes equal to the rent savings mandated by the rent control ordinance. The law thus confers no public benefit and serves no public purpose. As Judge Bea's dissent explained, the structure of the

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under the "failure to substantially advance" theory. The Supreme Court in *Lingle*, 544 U.S. at 536, did not dispute the underlying facts of the case, but ruled that *Penn Central* set forth the more appropriate legal standard to apply to a regulatory taking.

Goleta ordinance itself prevents the law from achieving its stated purpose of protecting mobilehome tenants from unreasonable rents. Pet. App. 40a-41a (citing Mason & Quigley, 16 J. Housing Econ. 192, 205 and noting that economists have criticized regulatory schemes like the Goleta ordinance in that "virtually all of the economic benefits from lower regulated rents are paid out annually to finance the higher sales prices commanded by those dwellings"). Mobilehome park owners are singled out to bear the entire burden of the wealth transfer that the Goleta rent control ordinance effects for the benefit of a discrete group of private citizens – the mobilehome tenants who happened to reside in the park at the time the rent control ordinance became effective.

A property owner in California could reasonably expect, given the demonstrated failure of this type of mobilehome rent control to advance any public purpose, that rational legislators would repeal such laws and/or courts would enjoin their continued application.

C. The Majority Opinion Erroneously Departed From *Palazzolo* By Presuming That Any Expectation Of A Change In Regulation Was Speculative.

Without benefit of a trial, the Ninth Circuit majority concluded that the Guggenheims' belief that their land would not be burdened indefinitely by the Goleta rent control ordinance was unreasonably speculative as a matter of law. Pet. App. 19a. That conclusion was not only fundamentally inconsistent

with the legal standards for determining reasonable expectations as established in *Palazzolo*, it also granted summary judgment in the face of genuinely disputed material facts.

The majority effectively required the Guggenheims to prove, in order to establish interference with investment-backed expectations, that their purchase price had been materially increased by an expectation that they would recoup the value that had been taken from the land by the regulation. Pet. App. 19a-20a. The majority then presumed, without evidence, that a prospective change in the law was not sufficiently "probable" to "materially affect the [purchase] price." Pet. App. 39a. (quotation marks omitted)

That ruling contravenes *Palazzolo* by establishing a threshold burden of proof that the plaintiff incurred incremental investment costs in purchasing regulated property. But under *Palazzolo*, the "lack of a personal financial investment by a post-enactment acquirer of property" will not defeat a *Penn Central* takings claim. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring).

The majority's summary judgment ruling also ignored record evidence that the Guggenheims' purchase price was influenced by an expectation that this constitutionally suspect law would terminate. As the dissent noted:

> Having determined that they might be able to free their mobilehome park from the Ordinance, the Guggenheims bought the land based on these investment-backed

> expectations – expectations which influenced the price they were willing to pay for the property as well as their expected rate of return on the investment.

Pet. App. 39a.

The Guggenheims' reasonable investment-backed expectation that they could enjoy the benefits of land ownership without the interference of the Goleta rent control law should have been a factor that weighed in favor of finding a regulatory taking under *Penn Central*. In concluding otherwise, the majority cast aside this Court's decision in *Palazzolo* and improperly applied the investment-backed expectation factor.

II. The Majority Opinion Is Inconsistent With *Penn Central* Because It Focuses Exclusively On One Factor.

Although the majority below acknowledged that *Penn Central* analysis requires a court to consider several factors to determine whether a regulatory taking has occurred, its discussion began and ended with the review of just one of those factors — "the extent to which the regulation has interfered with distinct investment-backed expectations." Pet. App. 18a (quotation marks omitted). Thus, even if the court's analysis of that factor were correct, which it was not, the decision would still be erroneous and warrant review.

The Ninth Circuit's decision is directly at odds with this Court's ruling in *Lingle* that "*several* factors have particular significance":

> Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the governmental action' — for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' — may be relevant in discerning whether a taking has occurred.

Lingle, 544 U.S. at 538-39 (quoting *Penn Central*, 438 U.S. at 124). In determining the character of the regulation, the Court should further consider (1) whether the regulation is "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127 (quotation marks omitted); (2) the allocation of the burden among all taxpayers and whether a landowner has been "singled out," *Lingle*, 544 U.S. at 543; *Penn Central*, 438 U.S. at 127 (considering whether the regulation "has an unduly harsh impact upon the owner's use of the property"); and (3) whether the effect of the regulation is functionally similar to a physical taking. *Lingle*, 544 U.S. at 539.

Judge Bea's dissent below recognized that *Penn Central* requires "a three-factor balancing test," not a "one-strike-you're-out' checklist." Pet. App. at 28a. "No one factor is 'talismanic;' Justice O'Connor so recognized in *Palazzolo* when she criticized the state supreme court for "elevating what it believed to be

'[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive status.'" *Id.* (internal citations omitted); *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002) ("[W]e have eschewed 'any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . The outcome instead 'depends largely' upon the particular circumstances [in the] case.") (internal citations omitted; second bracket in original).

It was fundamental error for the majority opinion not to consider all of the *Penn Central* factors. That failure was not harmless.

A. The Goleta Ordinance Has A Severe Economic Impact On The Value Of The Guggenheims' Property.

If the majority opinion had looked at the economic impact of the rent control law, as *Penn Central* and *Lingle* require, it would have found sufficient evidence to warrant a trial on the merits. The Goleta ordinance transferred 80% of the value of the Guggenheims' land by forcing the Guggenheims to rent their land at only 20% of its market value. Pet. App. 31a n.5. That value was transferred to an arbitrary group of private tenants who were able to sell their homes at premiums that were over 700% of the value of the home. *Id.* Mobilehomes worth $12,000 would sell for $100,000, with incoming tenants overpaying by $88,000. *Id.* This increased

cost to the public also represented a windfall to existing residents and a transfer of over 80% of the value of the Guggenheims' land to those existing residents.

The majority below did not dispute this evidence of economic impact and admitted that the value of the Guggenheims' property has been driven down by Goleta's rent control law. Pet. App. 18a. But the court decided that the fact the Guggenheims are forced to bear this burden is inconsequential. *Id.*

B. The Character Of The Goleta Ordinance Provides Grounds For Finding A Regulatory Taking.

The character of the government action at issue here also strongly militated in favor of finding a taking and provides further grounds why the taking claim should not have been resolved in favor of the City as a matter of law. Although the character of a regulation is central to determining whether a regulatory taking has in fact occurred under *Penn Central*, the majority completely ignored that factor.

To determine the character of the regulation, courts look to "balance the liberty interest of the private property owner against the Government's need to protect the public interest through imposition of the restraint." *Cienega Gardens v. United States*, 331 F.3d 1319, 1338 (Fed. Cir. 2003) (quotation marks omitted). Under the *Penn Central* takings analysis, the burden that a regulation imposes on a property must be balanced against whether that burden is reasonably necessary to achieve a public purpose, in order to determine both

if the regulation "goes too far" and whether the burden in fairness should be borne by the government. *Penn Central*, 438 U.S. at 127.[3]

The Court in *Lingle* noted that the *Penn Central* analysis focuses not only on "*the burden* a particular regulation imposes upon private property rights," but also on how that "regulatory burden is *distributed* among property owners." *Lingle*, 125 S. Ct. at 2084 (emphasis in original); *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate . . . the Takings Clause. . . ."). Laws that disproportionately and significantly burden only certain landowners will generally constitute a regulatory taking unless the burden on a select few was "reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Penn Central*,

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[3] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("[T]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of [property rights]."); *Keystone Bituminous Coal Association v. De Benedictis*, 480 U.S. 470, 488 (1987) ("[T]he nature of the [s]tate's interest in the regulation is a critical factor in determining whether a taking has occurred. . . ."); *see also Yee*, 503 U.S. at 529-30 (the fact that, under a mobilehome rent control ordinance, wealth was transferred only to "incumbent mobile home owner . . .might have some bearing on . . . whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance") (emphasis in original).

438 U.S. at 134 n.30. Additionally, the creation of a massive premium in the sale prices of mobilehomes is relevant to the character of government action because it bears on whether there is a "sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee v. City of Escondido,* 503 U.S. 519, 530 (1992).

Had the Ninth Circuit majority considered the evidence, it would have found ample evidence to permit a reasonable trier-of-fact to find that the Goleta rent control regulation places an undue and singular burden on the Guggenheims and that it lacks a reasonable relationship to a public purpose. Substantial evidence submitted by the Guggenheims in opposition to summary judgment established that the Goleta rent regulation creates a premium and effects a wealth transfer from property owners to tenants, depriving property owners of basic property rights without serving its stated purposes of protecting against unreasonable rents. "The designed structure and working of the ordinance amounts to nothing more than a wealth transfer from the landowner to the original tenant, and indisputably does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home."[4] Pet. App. 44a.

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[4] The majority contended that the Goleta law "protects owners of mobile homes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land." Pet. App. 24a. The dissent correctly uncovered the flaws in the majority's argument. *Id.* at 51a-52a. The costs of moving a mobile home are no different whether the home is being transferred from a

For these reasons, the character of the Goleta regulation militates strongly in favor of finding a *Penn Central* taking. Nonetheless, the Ninth Circuit majority made no more than a passing reference to this important *Penn Central* factor. *See* Pet. App. 18a ("*Lingle* points out that the character of the government action may also be relevant, but this cuts against the Guggenheims because the government action here is a continuation of an old ordinance") (footnote omitted).

This Court should grant certiorari and confirm that the Ninth Circuit has fundamentally misstated the governing constitutional principles for determining whether a regulatory taking has occurred.

CONCLUSION

The Ninth Circuit's *en banc* decision in *Guggenheim* creates unfounded constitutional rules that depart dramatically from the decisions of this Court and should not be permitted to stand.

The Petition for a Writ of Certiorari should be granted.

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rent controlled park or a market controlled one. In addition, the hundreds of thousands of dollars that are transferred to a single home owner by virtue of the Goleta rent control law cannot be justified by potential "costs of moving." Under any scenario, those costs are a small fraction (typically $10,000 or less) of the premiums generated and transferred to tenants under Goleta's rent control ordinance.

Respectfully Submitted,

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